Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

WILLIAM D. GILPIN,

Petitioner,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit must first apply the canons of constructions provided by the United States Supreme Court when interpreting veteran benefit statutes and regulations before determining whether the Department of Veteran Affair's regulation is a "reasonable" interpretation of the statute, pursuant to *Chevron, infra.*

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 155 F.3d 1353 (Fed.Cir. 1998) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Veterans Appeals in Gilpin v. West was unpublished, CVA No. 95-832 decided March 21, 1997, at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on September 11, 1998 and rehearing denied on October 28, 1998.

PROVISIONS INVOLVED

38 U.S.C. § 1110 Basic entitlement.

For disability resulting from personal injury suffered or disease contracted in line of duty, in the active military, naval or air service, during a period of war, the United States will pay to any veteran thus disabled and who was

discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 C.F.R. § 3.304(f). Post-traumatic stress disorder.

Service connection for post-traumatic stress disorder requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor. If the claimed stressor is related to combat, service department evidence that the veteran engaged in combat or that the veteran was awarded the Purple Heart, Combat Infantryman Badge, or similar combat citation will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor. Additionally, if the claimed stressor is related to the claimant having been a prisoner-of-war, prisoner-of-war experience which satisfies the requirements of Sec. 3.1(y) of this part will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor.

STATEMENT OF THE CASE

1. William Gilpin served on active duty in the U.S. Army from July 1965 until July 1968. In January 1987, Mr. Gilpin filed a claim with the Veteran's Administration

(VA) for disability compensation for a stress disorder, or Post-Traumatic Stress Disorder (PTSD). In July 1987, the VA denied Mr. Gilpin's claim for service connection for PTSD.

In February 1991, Mr. Gilpin requested a reopening of his claim for service-connection for PTSD. The VA denied his request for reopening, finding that no new and material evidence had been submitted to reopen the claim. Consequently, Mr. Gilpin filed a Notice of Disagreement (NOD) and additional evidence supporting his claim of PTSD. The VA again denied Mr. Gilpin a reopening of his claim for PTSD, and Mr. Gilpin appealed this denial to the Board of Veteran Appeals (BVA).

The BVA affirmed the VA's denial of entitlement, concluding that there was current diagnosis of PTSD. Mr. Gilpin appealed this decision to the CVA, which determined that 38 C.F.R. § 3.304(f) required a current diagnosis of PTSD in order to qualify for service connection benefits and that Mr. Gilpin did not have such a current diagnosis.

Mr. Gilpin appealed the CVA's decision to the Federal Circuit claiming that 38 C.F.R. § 3.304(f) was invalid because it conflicted with 38 U.S.C. § 1110. In upholding the CVA's decision, the Federal Circuit first determined that 38 U.S.C. § 1110 was "not plain on its face." *Gilpin, supra*, 155 F.3d at 1354.

The Federal Circuit conceded that the statute did not state that only "presently existing" or "current" disabilities would be entitled to benefits, nor did the statute mention current symptomatology. *Id.* However, the Federal Circuit determined that its "role in analyzing Mr.

Gilpin's challenge has been clearly delineated by the Supreme Court. *See, Chevron, U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)." *Id.* As such, the Federal Circuit determined that 38 C.F.R. § 3.304(f) was a "rational and permissible way to fill in the 'gap' in the statute, and therefore affirmed the CVA's decision. *Id.* at 1355.

REASONS FOR GRANTING THE WRIT

In enacting the laws regarding veteran benefits entitlement, Congress created a *sui generis* scheme for "awarding benefit entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998). As such, Congress further intended that the Agency resolve all issues regarding benefit entitlement by giving the veteran the benefit of the doubt. Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on its merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. H.R. Rep. No. 100-963, at 13 (1988), *reprinted in*, 1988 U.S.C.C.A.N. 5782, 5795.

This Court, in the only writ granted on appeal from the Federal Circuit regarding veteran benefit issues,

extended this rule to the Courts and held that any interpretive doubt **must** be resolved in the veteran's favor and against the Government. *See, Brown v. Gardner*, 513 U.S. 115, 118 (1994). The Federal Circuit's decision below upsets a careful balance struck, in favor of veterans, by Congress and this Court, and replaced it with a balance skewed in the Government's favor. The Federal Circuit's application of *Chevron*, and its principles of deference were misplaced by failing to first apply the specific canons of construction unique to veteran benefits statutes imposed by this Court in *Gardner*.

In *Chevron*, this Court acknowledged that Congress often left gaps remaining in statutes and it was therefore incumbent upon agencies to "fill in" such gaps. In determining whether the agency's act of filling in the gap through interpretive regulations was in keeping with the agency's authority, as provided by the statute, this Court admonished that "a court may not substitute its own construction . . . for a **reasonable** interpretation made by the administrator of an agency." *Chevron, supra*, 267 U.S. at 844. Thus, the predicate criteria for deferring to an agency's interpretation is whether the agency conceived "a reasonable interpretation" of the statute.

However, this Court, in addressing the specific issue of statutory construction as it relates to veteran benefits law, has established a mandatory canon of construction providing that any interpretive doubt must be resolved in the veteran's favor. As such, in the area of veteran benefits law, in deciding whether the Department's regulation constitutes a **reasonable** interpretation of the statute, the court or reviewing body **must first** decide whether the

Department's interpretation of the ambiguous statute benefits the veteran.

Meaning, the issue for the Federal Circuit to decide in the case below, and in all cases, is whether the Department's interpretation of an ambiguous statute, as expressed in a regulation, was interpreted in favor of the veteran or whether the Department's interpretation is in violation of the rule expressed in *Gardner*. If it is in violation of the *Gardner* rule, it is a **per se** unreasonable interpretation. Therefore, the deference required under *Chevron* is inapplicable. *Chevron* merely requires deference to a **reasonable** interpretation. An interpretation that is contrary to *Gardner's* mandatory canons of construction cannot, as a matter of law, result in a **reasonable** interpretation. The Federal Circuit, under *Gardner* must first analyze whether the challenged regulation at issue has resolved any statutory ambiguity in favor or in opposition to the veteran. This threshold analysis was not performed by the Federal Circuit in the opinion below.

In *Gardner*, this Court explicitly noted the tension between deferring to the Federal Circuit and resolving interpretive doubt in favor of veterans: "the most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in [its] favor . . . **(assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor.**"). *Gardner, supra*, 513 U.S. at 118 (*emphasis added*). Given that this Court has clearly and unambiguously articulated this rule as mandatory construction of all veteran benefits statutes, the Federal Circuit must be instructed to follow such precedent. This Court's *Chevron* and *Gardner* decisions do not

conflict, but the mandatory analysis of statutes and regulations in the granting of veterans benefits requires a preliminary or threshold analysis. If such analysis determines that the Department's interpretation complies with the *Gardner* mandates, then such an interpretation is reasonable and entitled to deference. However, if the *Gardner* analysis indicates that the Department did not resolve interpretive doubt in favor of the veteran in drafting its regulations and in favor of allowing benefits rather than denying benefits, such an interpretation is unreasonable.

The Federal Circuit, in the underlying case and others has rendered precedential opinions without any reference or deference to this Court's decision in *Gardner*. As such, this case presents an opportunity for this Court to definitively rule on the predicate analysis, under *Gardner*, to be given veteran benefits laws, prior to consideration of the reasonableness standard under *Chevron*. Such direction is vital in light of the unique nature of veteran benefit law and the proper construction to be afforded it.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

97-7075

WILLIAM D. GILPIN,

Claimant-Appellant,

v.

Togo D. West, Jr.,

SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

DECIDED: September 11, 1998

Before MICHEL, SCHALL, and GAJARSA, *Circuit Judges.*

GAJARSA, *Circuit Judge.*

DECISION

William D. Gilpin appeals the decision of the United States Court of Veterans Appeals in *Gilpin v. Brown, Secretary of Veterans Affairs*, No. 95-832 (Vet.App. May 21, 1997), which affirmed a May 3, 1995 decision of the Board of Veterans' Appeals ("Board"). Because we hold, under the principles of deference espoused in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that the Secretary of Veterans Affairs ("Secretary") permissibly interpreted 38 U.S.C. § 1110 to require "current symptomatology" at the time the claim is filed in order for a veteran to be entitled to compensation for a disability such as Post-Traumatic Stress Disorder

("PTSD") under that statute, we affirm the decision of the Court of Veterans Appeals.

BACKGROUND

No relevant facts are disputed. The facts of this case have been set out in detail in the Court of Veterans Appeals' decision and will be referred to in this opinion only to the extent necessary for an understanding of the issues that give rise to this appeal. Mr. Gilpin served on active duty in the U.S. Army from July 1965 until July 1968. Mr. Gilpin's separation examination was negative for PTSD. In January 1987, Mr. Gilpin filed a claim with the Veterans Administration ("VA") (now the Department of Veterans Affairs) for disability compensation for a "stress" disorder and other disabilities. In July 1987, the VA denied his claim for service-connection for his alleged disabilities, including PTSD. Mr. Gilpin appealed this denial to the Board, which affirmed the VA's decision.

In February 1991, the appellant requested a reopening of this claim for service-connection for PTSD. After considering this request, the VA found that no new and material evidence had been submitted to reopen the appellant's claim for service-connection for PTSD. The appellant then filed a Notice of Disagreement and additional evidence of PTSD. The VA again denied the appellant a reopening of his claim for PTSD. The Board ultimately affirmed the denial of entitlement, concluding that there was "no adequately supported diagnosis of PTSD of record," including no current diagnosis of PTSD.

The Court of Veterans Appeals determined that there was a plausible basis for the Board's finding of no valid

diagnosis of PTSD. In denying Mr. Gilpin's claim, the court also stated that (a) 38 C.F.R. § 3.304(f) requires a current diagnosis of PTSD in order to qualify for service-connection benefits and (b) Mr. Gilpin did not have such a current diagnosis. Mr. Gilpin then timely filed this appeal, challenging only the validity of section 3.304(f) in light of 38 U.S.C. § 1110 and other provisions of the veterans' benefits scheme.

DISCUSSION

We review interpretations of statutes and regulations by the Court of Veterans Appeals *de novo*. *See* 38 U.S.C. § 7292(a), (c) (1994); *Degmetich v. Brown*, 104 F.3d 1328, 1331 (1997). As with any question of statutory interpretation, we begin with the language of the statute itself. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Section 1110 provides for compensation to veterans for "service connected" disease or injury. *See* 38 U.S.C. § 1110 (1994). It states, in relevant part:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled . . . compensation as provided in this subchapter. . . .

Id. Furthermore, 38 C.F.R. § 3.304(f) (1997) states that, to establish service-connection for PTSD, the veteran must demonstrate "current symptomatology" of his disability.

Mr. Gilpin argues that this regulation adds an additional burden to the statutory requirement. Mr. Gilpin reasons that the statute only requires that the veteran have a disability, not that the disability be symptomatic at the time service-connection is sought or awarded. Mr. Gilpin contends that such a requirement is not contemplated in the statute and therefore is invalid. As further support, Mr. Gilpin argues that requiring "current symptomatology" for entitlement incorrectly conflates the issue of degree of disability with the issue of entitlement to disability.

The government, relying on *Degmetich*, maintains that Congress intended provisions authorizing benefits for service-connected disability to apply only in cases involving disability on the date of application. The government further argues that without current symptomatology, the Department of Veterans Affairs would have no means for determining that the alleged disability is in fact service-connected. While acknowledging Mr. Gilpin's argument that certain disabilities are entitled to a "zero percent" rating under the Secretary's rating system,[1] the government argues that the practice of assigning zero-percent ratings is consistent with the general requirement that service-connection be granted only in cases where the applicant exhibits current symptomatology.

---

[1] Certain regulations permit assignment of a "zero-percent" disability rating when the current degree of disability of a condition for which service-connection is established does not meet the requirements for entitlement to compensation.

We begin our analysis by noting that the meaning of section 1110 is not plain on its face. The statute speaks only of "disability resulting" from injury or disease and payment of compensation to a veteran "thus disabled." The statute does not say "presently existing" or "current" disability; it does not mention current symptomatology. While it is clear that allegations of a future disability are not sufficient for an award of compensation, the statute does not clearly and on its face say whether past disabilities support an award of compensation. Thus, all that can be fairly said about the statute is that it is silent on the matter of when the disabled veteran must be disabled. The parties direct us to nothing in the legislative history of relevance and we have found no guidance in our review of the legislative history as well.

Under these circumstances, our role in analyzing Mr. Gilpin's challenge has been clearly delineated by the Supreme Court. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In *Chevron*, the Court explained:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress had not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as

> would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43. The question for us to decide then is whether the requirement of current symptomatology is a rational and permissible way to fill the "gap" in the statute.[2]

We refer to our analysis in *Degmetich*, a case that analyzed 38 U.S.C. § 1131 (1994) which is identical in all respects to section 1110 but covers disability from injury or disease incurred in "other than a period of war." In *Degmetich*, we held that the requirement of a current disability at the time of application was not an impermissible interpretation of section 1311. *See Degmetich*, 104 F.3d at 1332. Mr. Gilpin attempts to distinguish the "current symptomatology" requirement in 38 C.F.R. § 3.304(f) from the "current disability" requirement which we approved of in *Degmetich*. However, any such distinction is illusory. A current disability cannot exist without some evidence of its existence. Therefore, these two requirements are one and the same for purposes of § 3.304(f).

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[2] It is beyond question that the Secretary has substantive rule-making power with respect to the benefits in question here and thus *Chevron* deference applies. *See Merck & Co., Inc. v. Kessler*, 80 F.3d 1543, 1549, 38 USPQ2d 1347, 1351 (Fed. Cir. 1996) (no *Chevron* deference when agency did not have rule-making authority in relevant area).

We find, as we found before in *Degmetich*, that the Secretary's interpretation requiring current symptomatology is supportable when viewed in the context of the other statutes involving the provision of veterans' benefits. Many of the statutes governing the provision of benefits for veterans only allow such benefits be given for disability existing on or after the date of application. *See Degmetich*, 104 F.3d at 1332 (referring to 38 U.S.C. § 5110(a) and 38 U.S.C. § 5111(a)). If Congress had been concerned with awarding compensation to any applicant who had a disability, presently existing or not, then it would not have so restricted the effective date of payments to the period of time after an application has been filed. Similarly, the statutes governing other benefits besides compensation afforded disabled veterans are limited to those veterans who have a service-connected disability at the time of application. *See* 38 U.S.C. § 1710 (1994); 38 U.S.C. § 1712 (1994). Given the structure of the law as a whole, the Secretary's interpretation of 38 U.S.C. § 1110 as requiring demonstration of symptoms at the time the application is filed cannot be considered arbitrary or unreasonable and thus is not "impermissible." We must therefore accept it. *See Chevron*, 467 U.S. at 844.

We have considered Mr. Gilpin's other arguments with regard to this issue and find them unpersuasive in the resolution of his appeal. We therefore affirm the Court of Veterans Appeals' decision upholding the Secretary's interpretation of section 1110 to require current symptomatology for PTSD cases.

CONCLUSION

Accordingly, the decision of the Court of Veterans Appeals is

AFFIRMED.

COSTS

Each party to bear its own costs.

Designated for electronic publication only

UNITED STATES COURT OF VETERANS APPEALS

No. 95-832

WILLIAM D. GILPIN, APPELLANT,

v.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE,

Before IVERS, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 28(i), this action may not be cited as precedent.

IVERS, *Judge*: The appellant appeals a May 3, 1995, decision of the Board of Veterans' Appeals (BVA or Board) which denied claims for entitlement to service connection for facial acne and skin condition and hearing loss, and reopening of a claim for a psychiatric disorder to include post-traumatic stress disorder (PTSD). *William D. Gilpin*, BVA 95-09287 (May 3, 1995). The Court has jurisdiction over the case pursuant to 38 U.S.C. § 7252(a). For the reasons set forth below, the Court will affirm the Board's May 1995 decision.

I. Background

The appellant served on active duty in the United States Army from July 13, 1965, to July 13, 1968. Record (R.) at 124. Service personnel records show that he served in the Republic of Vietnam as a construction machine

operator for the 568th Engineering Company from October 1966 to November 1967. R. at 116-18. At the preinduction physical, the examining physician noted that the appellant had acne on his chest and back. R. at 68, 73. He described the appellant's condition as "moderate" and considered it to be non-disqualifying. R. at 68-69. The examiner did not indicate any history of psychiatric problems or hearing trouble. *Ibid.*

Two weeks after induction, the appellant sought treatment for a sore throat, cough, and a rash. R. at 65. He was diagnosed with an upper respiratory infection with a severe acneiform rash on his back and shoulders. *Ibid.* The physician prescribed medication for the appellant's condition. The record contains no indication that the appellant sought follow-up treatment.

While in service, the appellant was treated for a variety of medical conditions (R. at 41-66), but none of them were related to acne, hearing, or a psychiatric condition. The appellant's separation examination was negative for any conditions at issue in this appeal. R. at 28-31.

On January 8, 1987, the appellant filed a VA Form 21-526. VETERAN'S APPLICATION FOR COMPENSATION OR PENSION, seeking entitlement to service connection for a right foot and leg injury, and "Vietnam stress." R. at 82-88. The appellant underwent a complete medical examination for purposes of disability evaluation in late February 1987. R. at 179-82. During that examination, the appellant complained of nervousness, ringing in his ears, stomach problems, vision problems, and pain in his left hand. R. at 179. The examining physician noted that the appellant's eardrums and hearing were normal, and that his skin

showed "multiple pimples" and a healed scar. R. at 180. The neurological and psychiatric evaluation showed that the appellant appeared normal and "well oriented." R. at 182.

The appellant underwent a complete psychiatric evaluation on March 5, 1987. R. at 102-06. The examining physician diagnosed the appellant with: (1) status post alcohol dependency; (2) right foot pathology, tinnitus, headaches – by history; (3) generalized anxiety disorder with insomnia and tension; and (4) personality disorder – mixed with dependent and borderline traits. R. at 105. The physician also noted "Doubt Post Traumatic Stress Disorder." *Ibid.*

On April 23, 1987, a dermatological examination of the appellant revealed "cystic acneiform lesions on the right cheek and central chest." R. at 153. The diagnostic impression was "generalized cystic, acneiform eruption of skin." *Ibid.*

The VA regional office (RO) denied service connection for several claimed disabilities including PTSD and cystic acne on July 27, 1987. R. at 189-95. The appellant filed a Notice of Disagreement (NOD) with the RO decision in August 1987 and requested a personal hearing. R. at 197. He perfected his appeal with the Board on December 7, 1987. R. at 217.

The BVA issued two decisions on July 19, 1988. The first decision denied entitlement to service connection for acquired psychiatric disorder and PTSD (R. at 236-42). The second decision denied the appellant's claims for other disabilities including chronic headaches, gastroenteritis, and residuals of an injury to the right hand. R. at

244-55. The appellant filed another NOD on August 16, 1990, and requested that VA reopen his claims. R. at 262-63.

On February 21, 1991, the appellant requested a reevaluation of his claim for service connection for PTSD, hearing loss, and skin condition. R. at 267. In response to a request for records, the RO received medical records from the VA Medical Center (VAMC) in Louisville, Kentucky. R. at 269-92. Those records showed that, during the period between January and February 1990, the appellant had been diagnosed and treated for acute sinusitis/bronchitis, parathesia (abnormal skin sensation), acute pharyngitis, and heartburn. R. at 275, 278, 279, 281, 283.

The appellant was admitted for eleven days to the VAMC in Louisville in February 1991, after his wife issued a Mental Inquest Warrant. R. at 287-91. During hospitalization, the physician observed the appellant to be very nervous and prescribed medication for nervousness and depression. R. at 289. Final diagnoses were: (1) adjustment disorder with mixed emotional features, major depression, and marital problems; and (2) hypertension by history and history of chest pain. R. at 286.

On March 19, 1991, the RO denied the appellant's claim for entitlement to service connection for skin disease and hearing loss. R. at 296-98. The RO also found that no new and material evidence had been submitted to reopen the appellant's claim for PTSD. R. at 297. The appellant filed a timely NOD on March 31, 1992. R. at 305, 312, 316.

The appellant submitted to VA, in October 1992, a copy of a Social Security Administration (SSA) decision

finding that he was totally disabled due to severe depression with PTSD, effective October 1, 1988. R. at 326-31. In response to the appellant's request, the RO obtained copies of the evidence relied upon by the SSA in making its PTSD finding. R. at 333, 335-504. That evidence included several medical diagnoses and impressions of PTSD. *See* R. at 342, 346, 357, 439, 450, 484, 497. In addition, the medical records evaluated by SSA included a diagnosis for acne vulgaris and folliculitis (R. at 347), but contained no report or diagnosis of hearing loss (R. at 433, 460).

In February 1993, the appellant underwent two VA psychiatric examinations. R. at 508-13, 514-20. During the first examination, the physician diagnosed the appellant with: (1) major depression, recurrent; (2) marital problems; (3) alcohol abuse, in recent remission; (4) post traumatic stress disorder symptomatology, not sufficient to warrant the diagnosis: (5) recurrent back pain; and (6) right knee pain. R. at 517. The examining physician noted:

> [The appellant] does have some PTSD features but they are not sufficient to warrant the full diagnosis based on this clinical interview and the information that he presented to me. He also was unable to state any specific dates, places, or persons killed that was specifically requested by the C[ompensation] & P[ension] examin[ation] request form. Therefore, psychiatric condition at this time is considered fair to good, prognosis is fair to good. This veteran is competent for VA purposes.

Ibid. During the second psychiatric examination, the appellant was diagnosed with: (1) alcohol abuse, in partial remission; (2) major depression; (3) personality disorder; and (4) hypertension. R. at 513. The examining physician noted: "The veteran described some relatively light combat on an infrequent basis. Although these memories are undoubtedly distressing to him, it is not felt that these events were of such severity as to warrant the diagnosis of PTSD." R. at 512.

Based upon the most recent medical evaluations, the RO issued a rating decision on April 15, 1993, denying entitlement to service connection for facial acne, skin condition and hearing loss, and denying the appellant a reopening of his claim for a psychiatric disorder to include PTSD. R. at 522-25. The appellant appealed, and all four claims were certified to the Board on May 20, 1993. R. at 537.

The BVA issued its opinion on May 3, 1995, denying the appellant's claims for facial acne, skin condition, and PTSD, and dismissing the hearing loss claim because it was not well grounded. *Gilpin*, BVA 95-09287; R. at 6-23. The appellant appealed this decision to the Court.

II. Analysis

A. Skin Condition Claim

Veterans are presumed to have entered service in sound condition. 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b) (1996). In the appellant's case, however, the preinduction examination revealed that he had moderate acne on his chest and back. R. at 68, 73. Consequently, the Board properly characterized his skin condition as preexisting

and considered whether it had been aggravated during service. R. at 10. Under the statute governing preexisting conditions, the provision says:

> A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1153. The determination of whether a preexisting disability was aggravated by service is a question of fact which is reviewed under the "clearly erroneous standard of review." *See Verdon v. Brown*, 8 Vet.App. 529, 525 (1996); 38 U.S.C. § 7261(a)(4); *Gilbert v. Derwinski*, 1 Vet.App. 49, 53 (1990) ("[I]f there is a 'plausible' basis in the record for the factual determinations of the BVA, even if this Court might not have reached the same factual determinations, [the Court] cannot overturn them.") BVA must provide an adequate statement of reasons and bases for its findings and conclusions on all material issues of fact or law, 38 U.S.C. § 7104(d)(1).

The Board pointed out that service medical records were negative for any symptoms or treatment of a skin condition during service. R. at 11. Although the Board erred in making this statement because the appellant had, in fact, been treated for acne two weeks after his induction (*see* R. at 65), this error is harmless in light of the fact that this Court has held that "temporary or intermittent flare-ups during service of a preexisting injury or disease are not sufficient to be considered to be 'aggravation in service' unless the underlying condition, as contrasted to symptoms, is worsened." *Hunt v. Derwinski*, 1 Vet.App.

292, 297 (1991). The Board noted, correctly, that prior to the appellant's separation from service, the appellant's skin was found to be normal with no acne problem noted. R. at 10, 30. The Board also pointed out that the first objective evidence of any post-service skin problem was in 1987, nineteen years after separation from service. R. at 12, 153, 473. In view of the evidence in the record to support the Board's findings that the skin condition was not aggravated by or during service, the Court holds that the findings have a plausible basis, and that the decision should be affirmed. *See Soyini v. Derwinski*, 1 Vet.App. 540, 546 (1991); 38 U.S.C. § 7261(b) ("Court shall take due account of the rule of prejudicial error").

The appellant argues, in his brief, that the Board should have considered whether his skin condition was aggravated by his exposure to Agent Orange. Appellant's Brief (Br.) at 9. However, this claim was not previously raised to, or adjudicated by, the Board and is, therefore, not properly before this Court for consideration. *See Talbert v. Brown*, 7 Vet.App. 352, 256 (1995); 38 U.S.C. § 7252(b).

B. Claim for Hearing Loss

To be eligible for veteran's benefits, the appellant must submit "evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." 38 U.S.C. § 5107(a). A "well[-]grounded claim is a plausible claim, one which is meritorious on its own or capable of substantiation. Such a claim need not be conclusive but only possible to satisfy the initial burden of [38 U.S.C. § 5107]." *Murphy v. Derwinski*, 1 Vet.App. 78,

81 (1990). "[W]here the determinative issue involves medical causation . . . competent medical evidence to the effect that the claim is 'plausible' or 'possible' is required." *Grottveit v. Brown*, 5 Vet.App. 91, 93 (1993).

In this case, the Board properly concluded that the appellant's claim for service connection for hearing loss was not well grounded. In its decision, the Board noted that the appellant's service records were negative for any evidence of hearing loss during service or after separation. R. at 12, 28, 31, 77, 180, 434, 460. In the absence of proof of any present disability, there can be no valid claim. *Brammer v. Derwinski*, 3 Vet.App. 223, 225 (1992).

The appellant argues, in his brief, that the Board erred in failing to assist the appellant in developing his claim for tinnitus. Appellant's Br. at 9-10. No duty to assist was triggered in this case, however, because the appellant failed to submit a well-grounded claim. 38 U.S.C. § 5107(a); *see Caluza v. Brown*, 7 Vet.App. 498, 505 (1995). Although the appellant periodically complained of tinnitus (*see* R. at 180, 383, 398), there is no evidence linking the tinnitus with his military service.

C. Evaluating the PTSD Claim

The appellant requests that his previously denied claim for PTSD be reopened. Pursuant to 38 U.S.C. § 5108, the Secretary must reopen a previously and finally disallowed claim when "new and material evidence" is presented or secured with respect to that claim. The Board found that the evidence presented since the first 1988 BVA decision was new and material. However, the BVA

found that, since there was no current valid diagnosis of PTSD, the appellant's claim must be denied. R. at 17-20.

Adjudication of a well-grounded claim for service connection for PTSD requires the evaluation of the evidence in light of the places, types, and circumstances of service, as evidenced by service records, the official history of each organization in which the veteran served, the veteran's military records, and all pertinent medical and lay evidence. 38 U.S.C. § 1154(a); 38 C.F.R. §§ 3.303, 3.304(f) (1996); *see also Hayes v. Brown*, 5 Vet.App. 60, 66 (1993). A finding of service connection for PTSD is a finding of fact which must be reviewed by this Court under the "clearly erroneous standard." *Boeck v. Brown*, 6 Vet.App. 14, 16 (1993). Section 3.304 of 38 C.F.R. sets forth the standard for evaluating PTSD claims:

> (f) *Post-traumatic stress disorder.* Service connection for post-traumatic stress disorder requires medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor. If the claimed stressor is related to combat, service department evidence that the veteran engaged in combat or that the veteran was awarded the Purple Heart, Combat Infantryman Badge, or similar combat citation will be accepted, in the absence of evidence to the contrary, as conclusive evidence of the claimed inservice stressor.

38 C.F.R. § 3.304(f) (1996). To summarize, an award for PTSD requires: (1) a current, clear medical diagnosis of PTSD (presumed to include the adequacy of the PTSD

symptomatology and the sufficiency of a claimed in-service stressor); (2) credible supporting evidence that the claimed in-service stressor actually occurred; and (3) medical evidence of a causal nexus between current symptomatology and the specific claimed in-service stressor. *See, ibid.; Cohen v. Brown*, ___ Vet.App. ___, ___, No. 94-661, slip op. at 13 (Mar. 7, 1997).

The Board acknowledged that the appellant had been diagnosed with PTSD by different examiners following his separation from service. R. at 18-19. Although the SSA determined that the appellant had PTSD, the Board is not required to grant service connection for PTSD based upon that finding. *See Wilson v. Derwinski*, 2 Vet.App. 614, 618 (1992). Instead, the Board gave greater weight to the medical conclusions in two recent VA psychiatric examinations that explicitly rejected a PTSD diagnosis in the appellant. R. at 512, 517. Both examining psychiatrists concluded that the appellant had other psychiatric disorders but not PTSD. It is the responsibility of the BVA, not this Court, to assess the credibility and weight to be given to the evidence. *See Wood v. Derwinski*, 1 Vet.App. 190, 192-93 ("Of course, if the BVA decision fails to give sufficient 'reasons for bases' for accepting or rejecting critical evidence, expert or otherwise, then a remand for further proceedings may be appropriate."); *see also Gilbert*, 1 Vet.App. at 55-59.

Based upon the most recent medical evaluations of the appellant, the Board's determination that there is no valid PTSD diagnosis has a plausible basis in the record. Without a current diagnosis for PTSD, the appellant cannot be entitled to service connection for this condition. 38 C.F.R. § 3.304(f); *see also Cohen, supra*. The Board provided

adequate reasons for bases for its findings, so the decision cannot be found to be clearly erroneous. 38 U.S.C. § 7261(a)(4); *Gilbert*, 1 Vet.App. at 53.

D. Personality Disorder Claim

Finally, the appellant argues that his personality disorder was aggravated by his military service. Appellant's Br. at 14. This argument fails because there is no evidence to support the claim that the appellant suffered from a personality disorder prior to his induction into the military. The record shows no diagnosis of a personality disorder until 1987. R. at 501. Furthermore, a psychological report completed in March 1991 specifically ruled out a personality disorder diagnosis in the appellant. R. at 357. In its decision, the Board found that there is no evidence to support a claim for any psychiatric disorder attributable to service. R. at 22. The Court holds that the BVA's findings on this issue are not clearly erroneous and, therefore, affirms the Board's decision.

III. Conclusion

Accordingly, the 1995 BVA decision is AFFIRMED.

DATED: May 21, 1997

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Department of Veterans Affairs
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United States Court of Appeals for the Federal Circuit

ORDER

(Filed Oct. 28, 1998)

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 4, 1998.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: October 28, 1998

cc: KENNETH CARPENTER
LUKE LEVASSEUR

GILPIN V DVA, 97-7075
(CVA-95-832)

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

97-7075

WILLIAM D. GILPIN,

Claimant-Appellant,

v.

Togo D. West, Jr.,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF VETERANS APPEALS

In CASE NO(S). 95-832

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF
THE COURT

DATED SEP 11 1998

/s/ Jan Horbaly
Jan Horbaly, Clerk

ISSUED AS A MANDATE:
NOVEMBER 4, 1998

PETITION OF CLAIMANT-APPELLANT, WILLIAM D. GILPIN, FOR REHEARING AND SUGGESTIONS FOR HEARING IN-BANC

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-7075

WILLIAM D. GILPIN,

Claimant-Appellant,

v.

TOGO D. WEST, JR.,
Acting Secretary of Veterans Affairs,

Respondent-Appellee.

PETITION REGARDING APPEAL FROM JUDGMENT OF THE UNITED STATES COURT OF VETERANS APPEALS IN 95-832 ENTERED JUNE 12, 1997
JUDGE DONALD L. IVERS

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September 23, 1998 **Attorney for Claimant-Appellant, William D. Gilpin**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WILLIAM D. GILPIN,

Claimant-Appellant,

v. No. 97-7075

TOGO D. WEST, JR.,
Secretary of Veterans Affairs,

Respondent-Appellee.

CLAIMANT-APPELLANT'S PETITION FOR REHEARING AND SUGGESTIONS FOR HEARING IN-BANC

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, Claimant-Appellant, William D. Gilpin ("Appellant") respectfully moves for rehearing and proffers suggestions for hearing in-banc of the September 11, 1998 decision of this Court affirming the U.S. Court of Veterans Appeals' decision ("CVA") in the case of ***Gilpin v. Brown***[1], U.S. Vet.App. No. 95-832 (May 21, 1997).

Point of Law to be Considered

Appellant respectfully submits that in its September 11, 1998 decision, this Court failed to consider and

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[1] Togo D. West, Jr. replaced Jesse Brown as Secretary of the Department of Veterans Affairs on January 1, 1998, and was subsequently substituted as the Respondent-Appellee in this case, pursuant to R. 43(c) of the Federal Rules of Appellate Procedure.

properly apply the holding of the United States Supreme Court in ***Brown v. Gardner,*** 513 U.S. 115 (1994).[2]

Argument

Congress, in enacting the laws regarding entitlement to compensation for this nation's veterans, created a veteran-friendly scheme and mandated that the rule of law that the agency *must* resolve any ambiguity in the veterans statutes in favor of the veteran, and against the Government. ***See, e.g., Gardner,*** 513 U.S. at 118. The Supreme Court in ***Gardner*** extended this rule to the Courts. The Court's decision herein will upset the careful balance struck, in favor of veterans, by Congress and the Supreme Court, replacing it with a balance skewed in the Government's favor. This Court's application of ***Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.,*** 467 U.S. 837 (1984) and its principals of deference have been misplaced by failing to first analyze the statute and regulation in question under the mandatory rules of construction imposed by the United States Supreme Court's holding in ***Gardner.***

The Supreme Court in ***Chevron*** admonishes that, "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." ***Chevron,*** 467 U.S. at 844. The predicate criteria is whether "a reasonable interpretation" has been made by the agency. The Supreme Court in ***Gardner*** establishes a

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[2] ***Brown v. Gardner*** will hereinafter be cited as "Gardner".

mandatory canon of construction applicable to the interpretation of ambiguous statutes granting benefits to veterans. The statute at issue in this case, 38 U.S.C. § 1110, clearly is a statute which grants benefits. Under the Supreme Court's holding in ***Gardner***, the agency and this Court must as a preliminary matter determine whether the agency interpretation is in compliance with the Supreme Court's holding in ***Gardner***.

Specifically, the question is whether the agency's interpretation of an ambiguous statute as expressed in a regulation was interpreted in favor of the veteran or is in violation of the rule as expressed in ***Gardner***. If it is in violation of the rule in ***Gardner***, it is per se an "unreasonable" interpretation. Therefore the deference required under ***Chevron*** is inapplicable. ***Chevron*** requires deference to a reasonable interpretation, an interpretation of statute which is contrary to the mandatory rule in ***Gardner*** cannot as a matter of law result in a "reasonable interpretation". This Court under ***Gardner*** must initially analyze whether the regulation which is challenged in fact has resolved any ambiguity in the statute in favor or in opposition to veterans. This threshold analysis was not undertaken in this case.

The agency's interpretation of 38 U.S.C. § 1110, as expressed in 38 C.F.R. § 3.304(f), is flatly contrary to the rule described in ***Gardner*** requiring resolution of any ambiguity in § 1110 to be in favor of the veteran and against the government. In this matter the panel did not undertake a preliminary analysis of the regulation and determine whether the ambiguity in the statute was resolved under the mandatory construction required by ***Gardner***. The Supreme Court has mandated that veterans

benefits statutes must be analyzed under the foregoing criteria: is the Government's interpretation that must be compelled by the statute, *not* the veteran's, and the mere fact that the Government's interpretation may be "reasonabl[e]" is not a sufficient basis for ruling against a veteran. ***Id.***

In ***Gardner***, the Supreme Court explicitly noted the tension between deferring to the VA (as the Federal Circuit has done in this case) and resolving interpretive doubt in favor of veterans. 513 U.S. at 118. Given that the United States Supreme Court has clearly and unambiguously articulated this rule as mandatory construction of all statutes involving veterans benefits, this Court must recognize its obligation to follow such precedent. The decisions by the Supreme Court in ***Chevron*** and ***Gardner*** do not have to conflict. But the mandatory analysis of statutes and regulations in the granting of veterans benefits requires a preliminary or threshold analysis. If such analysis determines that the agency's interpretation complies with the mandates of ***Gardner***, then such interpretation is reasonable and is entitled to deference. To the contrary, however, if the ***Gardner*** analysis indicates that the agency has not resolved interpretive doubt in favor of the veteran and in favor of allowing benefits rather than denying benefits, such an interpretation is unreasonable. If the interpretation is unreasonable then ***Chevron*** deference is not required.

This case presents to this Court an opportunity to correct a premature reliance upon ***Chevron*** and to conform this decision with the mandates of ***Gardner***. ***Gardner*** and ***King v. St. Vincent's Hospital***, 502 U.S. 215 (1991) instruct that prior to applying ***Chevron***, the reviewing

court must ensure that the agency, in its regulation, resolved any ambiguity in the statute in the veteran's favor. While the Supreme Court, in its decision in ***Gardner*** notes a tension between its holding in ***Gardner*** and ***Chevron***, there can be no question that the Supreme Court clearly articulated the mandatory rules regarding the interpretation of the veterans benefits statutes. ***Gardner***, 513 U.S. at 118. Notwithstanding the tension between the Supreme Court's holding in ***Gardner*** and ***Chevron***, the rule of law in ***Gardner*** is clear – every reasonable doubt on every issue, including statutory construction, must be resolved in favor of the veteran.

As this Court has noted in ***Chevron***, this Court ruled that, as a general matter, federal courts must defer to administrative agencies' interpretations of the statutes administered by the agencies. The court held that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." 467 U.S. at 843 (quoting ***Morton v. Ruiz***, 415 U.S. 199, 231 (1974)). As a result, where there is a "gap" in a statute, the agency has the authority to fill that "gap," and "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." ***Id.*** at 844.

The Supreme Court requires a different approach when assessing a veterans benefits statute. In the context of veterans benefits statutes, there is an established "canon" of construction providing that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." ***King***, 502 U.S. at

221 n. 9 (citing ***Fishgold v. Sullivan Drydock & Repair Corp.***, 328 U.S. 275, 285 (1946)). The Court in ***King*** added that in light of this canon, it is to be presumed that in enacting laws providing benefits for veterans, Congress intended for the benefit of any doubt as to statutory meaning to be afforded to the veteran. ***Id.*** In ***Gardner***, this Court again recognized "the rule that interpretive doubt is to be resolved in the veteran's favor." 513 U.S. at 118.

These two rules need not be flatly inconsistent nor incompatible. ***Chevron's*** rule of deference instructs courts to respond to statutory ambiguity by accepting any "permissible" interpretation advanced by the agency. 467 U.S. at 843. The ***King/Gardner*** rule, however, commands a preliminary or threshold analysis of the statute and the regulation in question, it requires that statutory ambiguity must be resolved in favor of the veteran, not the Government. These two standards can be read harmoniously and co-exit. The Supreme Court has explicitly noted that it is open to question whether the Secretary of Veterans Affairs can lay claim to ***Chevron*** deference. ***See Gardner***, 513 U.S. at 117-118 (stating that "[t]he most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in [its] favor . . . (*assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor*)") (emphasis added) (citing ***King***).

Unquestionably the panel decision in this case has been consistent with this Court's precedent as articulated in ***Travelstead v. Derwinski***, 978 F.2d 1244, 1250 (Fed. Cir. 1992); ***Skinner v. Brown***, 27 F.3d 1571, 1575 (Fed. Cir. 1994); ***McCay v. Brown***, 106 F.3d 1577, 1579-81 (Fed. Cir.

1997); and ***Degmetich v. Brown,*** 104 F.3d 1328, 1329 (Fed. Cir. 1997). In light of this precedent, it comes as no surprise that this Court has deferred to the Secretary's interpretation of 38 U.S.C. § 1110 in this case. However, the analysis in each of these cases was made without the benefit of the canons of statutory construction as articulated in ***Gardner. Travelstead*** and ***Skinner*** having both been decided pre-***Gardner;*** and ***McCay*** and ***Degmetich*** having been decided post-***Gardner.*** Additionally, the Appellant would direct the Court's attention to a recent panel decision of this Court in ***Bazalo v. Brown,*** ___ F.3d ___, (Fed. Cir. No. 97-7060, decided 8/6/98), in which Judge Rich begins his opinion with reference to the obligation to resolve interpretive doubt regarding a statute under the criteria expressed by the United States Supreme Court in ***Gardner.***

The panel decision concluded that the problem with Mr. Gilpin's interpretation of the statute was that it was not "compelled" by the text of the statute. As such, the Court ruled he could not prevail because "the Secretary's interpretation of 38 U.S.C. § 1110, as requiring demonstration of symptoms at the time the application is filed, cannot be considered arbitrary or unreasonable and thus is not 'impermissible'. We must therefore accept it. ***See Chevron,*** 467 U.S. at 844." This reliance upon ***Chevron*** was premature because the panel failed to analyze the statute and the Secretary's regulation under "the rule that interpretive doubt is to be resolved in the veteran's favor." ***Gardner,*** 513 U.S. at 118.

In light of the Supreme Court's decision in ***Gardner,*** there exists no reason for this Court to prematurely defer to the Secretary and to rely upon the Supreme Court's

holding in ***Chevron*** without first applying the mandatory canons of construction provided by the United States Supreme Court in ***Gardner***. The Federal Circuit must revisit this decision and reconsider this matter in light of the need for compliance with ***Gardner***. The Court in this case is now presented the opportunity to comply with the necessary threshold analysis mandated by the United States Supreme Court.

The panel in this matter did not refer to or otherwise address the Supreme Court's decision in ***Gardner***. In light of that fact, as well as the fact that this Court has rendered other precedential opinions without reference or discussion of ***Gardner*** as concerns the issues discussed in this petition, the Appellant prays that this Court consider the suggestions contained herein in support of rehearing by the panel or hearing upon these suggestions of this issue in-banc.

Respectfully Submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

WILLIAM D. GILPIN,
Claimant-Appellant,

v. No. 97-7075

TOGO D. WEST, JR.,
Secretary of veterans Affairs,
Respondent-Appellee.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, William D. Gilpin ("Appellant") respectfully moves for rehearing of the September 11, 1998 decision of this Court affirming the U.S. Court of Veterans Appeals' decision ("CVA") in the case of *Gilpin v. Brown*, U.S. Vet.App. No. 95-832 (May 21, 1997).[1]

POINT OF LAW TO BE CONSIDERED

Appellant respectfully submits that in its September 11, 1998, decision, this Court failed to consider and properly apply the holding of the United States Supreme Court in *Brown v. Gardner*, 513 Sup. Ct. 115 (1994).

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[1] Togo D. West, Jr. replaced Jesse Brown as Secretary of the Department for Veterans Affairs on January 1, 1998, and was subsequently substituted as the Respondent-Appellee in this case, pursuant to R. 43(c) of the Federal Rules of Appellate Procedure.

ARGUMENT

Congress in enacting the laws regarding entitlement to compensation for this nation's veterans created a veteran-friendly scheme and mandated that the rule of law that courts and the agency alike *must* resolve any ambiguity in the veterans statutes in favor of the veteran, and against the Government. *See, e.g., Brown v. Gardner,* 513 U.S. 115, 118 (1994). The Federal circuit in this decision, as in others which have been decided since the Supreme Court's ruling in *Brown v. Gardner,* have upset the careful balance struck by Congress in favor of veterans, replacing it with a balance skewed in the Government's favor. This Court's reliance upon *Chevron,* (cite), and its principles of deference is misplaced and in direct conflict with the United States Supreme Court holding in *Brown v. Gardner.*

It is flatly contrary to the rule described in *Brown v. Gardner* – for the Federal circuit to defer to the Secretary's interpretation of 38 U.S.C. § 1110 to "require symptomatology" at the time the claim is filed in order for the veteran to be entitled to compensation for a disability such as Post-Traumatic Stress Disorder ("PTSD"). In this matter the panel had the rule precisely backwards – under *Brown v. Gardner,* it is the Government's interpretation that must be compelled by the statute, *not* the veteran's, and the mere fact that the Government's interpretation may be "reasonabl[e]" is not a sufficient basis for ruling against a veteran. *Id.*

In *Brown v. Gardner,* the Supreme Court explicitly noted the tension between deferring to the VA (as the Federal Circuit has done in this case) and resolving interpretive doubt in favor of veterans. 513 U.S. at 118. Given

that the United States Supreme Court has clearly and unambiguously articulated this rule as reflected in the statutory scheme for veterans benefits, this Court must recognize both its obligation to follow precedent and to no longer resolve questions of statutory interpretation by providing deference to the agency but by resolving every reasonable doubt in favor of the veteran.

This case presents to this Court an opportunity to correct an obvious error in its reliance upon *Chevron* and to conform this decision with the mandates of *Brown v. Gardner.* In *Brown v. Gardner* and *King v. St. Vincent's Hospital,* 502 U.S. 215 (1991), completely opposite instruction from that of *Chevron* is provided for, requiring courts to resolve any ambiguity in the veteran's favor. While the Supreme Court has noted in its decision in *Gardner* that such a conflict exists, there can be no question that the Supreme Court was interpreting the veterans benefits statutes. *Gardner,* 513 U.S. at 118. Notwithstanding this conflict, the rule of law in *Gardner* is clear – every reasonable doubt on every issue, including statutory construction, must be resolved in favor of the veteran. While this may directly conflict with *Chevron,* it is equally clear by the Supreme Court's language in *Brown* that statutory interpretation in the context of veterans benefits is different.

As this Court has noted, in *Chevron,* this court ruled that, as a general matter, federal courts must defer to administrative agencies' interpretations of the statutes administered by the agencies. The court held that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any

gap left, implicitly or explicitly, by Congress." 467 U.S. at 843 (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). As a result, where there is a "gap" in a statute, the agency has the authority to fill the "gap," and "a court may not substitute its own construction . . . for a reasonable interpretation made by the administrator of an agency." *Id.* at 844.

A very different rule, however, applies in the context of veterans law. In that context, there is an established "canon" of construction providing that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 n. 9 (1991) (citing *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). The Court in *King* added that in light of this canon, it is to be presumed that in enacting laws providing benefits for veterans, Congress intended for the benefit of any doubt as to statutory meaning to be afforded to the veteran. *Id.* In *Brown v. Gardner*, this Court again recognized "the rule that interpretive doubt is to be resolved in the veteran's favor." 513 U.S. at 118.

These two rules are flatly inconsistent – and logically incompatible – with each other. *Chevron*'s rule of deference instructs courts to respond to statutory ambiguity by accepting any "permissible" interpretation advanced by the agency. 467 U.S. at 843. The *King/Gardner* rule, however, commands the opposite result – statutory ambiguity must be resolved in favor of the veteran, not the Government. These two standards thus are at war with each other and cannot co-exist. Not surprisingly, therefore, the Supreme Court has explicitly noted that it is open to question whether the Secretary of Veterans Affairs can

law claim to *Chevron* deference. *See Brown v. Gardner*, 513 U.S. at 117-118 (stating that "[t]he most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in [its] favor . . . (*assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor*)") (emphasis added) (citing *King*).

Even though *Chevron* deference and the rule that ambiguity must be resolved in favor of veterans are patently inconsistent, as recognized in *Gardner*, the Federal Circuit has squarely ruled, both before and after *Gardner*, that the Secretary is nonetheless entitled to *Chevron* deference. *See, e.g., McCay v. Brown*, 106 F.3d 1577, 1579-81 (Fed. Cir. 1997); *Degmetich v. Brown*, 104 F.3d 1328, 1329 (Fed. Cir. 1997); *Skinner v. Brown*, 27 F.3d 1571, 1575 (Fed. Cir. 1994); *Travelstead v. Derwinski*, 978 F.2d 1244, 1250 (Fed. Cir. 1992).

In *Degmetich v. Brown*, for example, the court held that in the veterans context, "[w]e review interpretations of statutes . . . applying the two-step test articulated in *Chevron*." *Id.* at 1331 (citation omitted). *Chevron* deference was critical to the court's ruling because it "disagree[d] with both sides' contentions that the meaning of [38 U.S.C.] section 1131 is plain and ambiguous on its face." *Id.* Because the statute was "silent" on the matter before it, *id.*, the court held that the only pertinent question was whether the Secretary's construction "is a rational and permissible way to fill the 'gap' in the interpretation of the statute." *Id.* at 1332 (quoting *Chevron*, 467 U.S. at 842-43). Because, in its view, the Secretary's reading "cannot be considered arbitrary," the court concluded that under *Chevron* "[w]e must therefore accept the Secretary's

interpretation." *Id; see also id.* at 1329 ("[W]e hold, under the principles espoused in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, that the Secretary permissibly interpreted 38 U.S.C. § 1131 (1994). . . . ") (citation omitted).

This holding was consistent with the court's prior embraces of *Chevron* deference in spite of the rule that interpretive doubts must be resolved in the veteran's favor. *See e.g., McCay v. Brown*, 106 F.3d at 1579-81 (stating that if Congress " 'has not spoken directly, . . . a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency' ") (quoting *Chevron*, 467 U.S. at 843-44); *Skinner v. Brown*, 27 F.3d at 1575 ("an agency's interpretation of a statute deserves deference . . . 'if the statute is silent or ambiguous with respect to the specific issue' ") (quoting *Chevron*, 467 U.S. at 843); *Travelstead v. Derwinski*, 978 F.2d at 1250 (VA's interpretive rules "are of legislative weight and must be given controlling weight by this court unless they are arbitrary, capricious, or manifestly contrary to the statute") (citing *Chevron*, 467 U.S. at 843-44).

In light of this precedent, it comes as no surprise that this Court has deferred to the Secretary's interpretation of 38 U.S.C. § 1110 in this case. The problem with Mr. Gilpin's interpretation of the statute, in the eyes of the panel, was that it was not "compelled" by the text of the statute. As such, the court ruled, he could not prevail because "the Secretary's interpretation of 38 U.S.C. § 1110 as requiring demonstration of symptoms at the time the application is filed cannot be considered arbitrary or unreasonable and thus is not 'impermissible'. We must

therefore accept it." *See Chevron*, 467 U.S. 844. This reliance upon *Chevron* is misplaced and at odds with "the rule that interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118.

In light of the Supreme Court's decision in *Gardner*, there exists no reason for this Court to continue to defer to the Secretary and to rely upon the Supreme Court's holding in *Chevron*. The Federal Circuit has clearly but erroneously relied upon *Chevron* in support of its conclusion that the Secretary is entitled to *Chevron* deference. This Court in this case is now presented the opportunity to correct that error.

Respectfully Submitted,

/s/ _____

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel for appellant certifies the following:

1. The full name of every party or amicus represented by me is:

   William D. Gilpin

2. The name of the real party in interest, if different than the above, is:

   None

3. The parent companies, subsidiaries, and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party now represented by me expected to appear in this court are:

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CERTIFICATE OF SERVICE

I hereby certify that I forwarded two copies of the above and foregoing document, by UPS Overnight Mail, this ____ day of September, 1998, addressed to the following:

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1100 L. Street, N.W., Room 11058
Washington, D.C. 20530

/s/ _____
Kenneth M. Carpenter

(2)

Supreme Court, U.S.
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No. 98-1203

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM D. GILPIN, PETITIONER

v.

TOGO D. WEST, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a regulation of the Secretary of Veterans Affairs requiring "current symptomatology" as a prerequisite to disability compensation for Post-Traumatic Stress Disorder is per se unreasonable and not entitled to judicial deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the ground that it does not resolve all interpretive doubts in favor of the veteran.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 155 F.3d 1353. The memorandum opinion of the United States Court of Veterans Appeals (Pet. App. 9-20) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22) was entered on September 11, 1998. A petition for rehearing was denied on October 28, 1998 (Pet. App. 21). The petition for a writ of certiorari was filed on January 26, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 1110 of Title 38 of the United States Code provides for compensation to veterans "[f]or disability resulting from personal injury suffered or disease contracted in line of duty * * * during a period of war." Veterans requesting compensation under that Section for claims of service-related Post-Traumatic Stress Disorder (PTSD) must present "medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor." 38 C.F.R. 3.304(f).

2. Petitioner served in the United States Army from July 1965 to July 1968. Pet. App. 2, 9. Service personnel records show that for some of that time (October 1966 to November 1967) petitioner served as a construction machine operator in the Republic of Vietnam. *Id.* at 9-10. Petitioner's separation examination was negative for PTSD. *Id.* at 2, 10.

In January 1987, petitioner submitted a claim to the Department of Veterans Affairs (VA) seeking disability compensation for, among other things, "Vietnam stress." Pet. App. 2, 10. Petitioner underwent a complete psychiatric examination on March 5, 1987. *Id.* at 11. The examining physician noted "Doubt Post Traumatic Stress Disorder." *Ibid.* In July 1987, the VA denied petitioner's claim for disability compensation for PTSD. *Id.* at 2, 11. Petitioner's appeal of that denial was affirmed by the Board of Veterans' Appeals (BVA). *Ibid.*

3. In February 1991, petitioner asked the VA to reevaluate his PTSD claim. Pet. App. 12. The VA reviewed petitioner's medical and psychological records

and concluded that no new and material evidence had been submitted that justified reopening the claim. *Id.* at 2, 12. Petitioner filed a Notice of Disagreement in March 1992. *Id.* at 2. In October 1992, petitioner submitted to the VA a copy of a Social Security Administration (SSA) determination, which had become effective October 1, 1988, finding that petitioner was totally disabled due to severe depression with PTSD. *Id.* at 12-13. In response, the VA obtained copies of the evidence upon which the SSA relied in making its PTSD finding, and petitioner was examined by two more VA psychiatrists. *Id.* at 2, 12-13. Although each examining physician diagnosed petitioner with, among other things, "major depression," each also found that a diagnosis of PTSD was not warranted. *Id.* at 13-14. Based on this evidence, in April 1993 the VA again refused to reopen petitioner's PTSD claim. *Id.* at 14.

Petitioner appealed again to the BVA, and in May 1995 the BVA, after reviewing the evidence relating to the PTSD claim, again determined that it had been properly denied. Pet. App. 2, 14. Specifically, the BVA concluded that there was "'no adequately supported diagnosis of PTSD of record,' including no current diagnosis of PTSD." *Id.* at 2 (court of appeals quoting BVA opinion). The BVA acknowledged the SSA's finding of PTSD, but gave greater weight to the medical conclusions of the two more recent VA psychiatric examinations which, while noting that petitioner had some psychiatric disorders, explicitly rejected a diagnosis of PTSD. *Id.* at 19.

4. Petitioner timely appealed the BVA's decision to the Court of Veterans Appeals (CVA). In May 1997, that court also rejected petitioner's PTSD claim. The CVA noted that the Secretary's regulation setting forth the standard for evaluating claims of PTSD requires

"medical evidence establishing a clear diagnosis of the condition, credible supporting evidence that the claimed inservice stressor actually occurred, and a link, established by medical evidence, between current symptomatology and the claimed inservice stressor." 38 C.F.R. 3.304(f), quoted in full at Pet. App. 18. The CVA interpreted this regulation to require "a current, clear medical diagnosis of PTSD (presumed to include the adequacy of the PTSD symptomatology * * *)." Pet. App. 18-19. The CVA found that "the [BVA]'s determination that there is no valid PTSD diagnosis has a plausible basis in the record" (*id.* at 19) and that the BVA "provided adequate reasons for bases for its findings." *Id.* at 19-20. Thus, the CVA concluded, the BVA correctly determined that petitioner did not have PTSD. *Id.* at 20.

5. Petitioner then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed the CVA's decision. Petitioner argued that, by requiring evidence of "current symptomatology" in 38 C.F.R. 3.304(f), the VA impermissibly had imposed a requirement that was not contemplated in 38 U.S.C. 1110, the statute which 38 C.F.R. 3.304(f) implements. Pet. App. 3. The court of appeals began its analysis by pointing out that Section 1110 "is not plain on its face," that it "does not clearly * * * say whether past disabilities support an award of compensation," and, consequently, that "all that can be fairly said about the statute is that it is silent on the matter of when the disabled veteran must be disabled." Pet. App. 5. The legislative history of Section 1110, the court noted, was silent on that matter as well. *Ibid.* The court then stated that, "[u]nder these circumstances," the question before it was whether the VA had filled the statutory "gap" in a "rational and permissible" manner with 38

C.F.R. 3.304(f)'s "current symptomatology" requirement. See Pet. App. 5-6 (discussing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984)).

The Federal Circuit upheld the regulation as a permissible interpretation of the statute. The court pointed out that the "current symptomatology" requirement is indistinguishable from the "current disability" requirement that the court previously had upheld as a permissible interpretation of 38 U.S.C. 1131, a statute "which is identical in all respects to section 1110 but covers disability from injury or disease incurred in 'other than a period of war.'" Pet. App. 6 (discussing *Degmetich* v. *Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997)). Like the "current disability" requirement, the court explained, the "current symptomatology" requirement "is supportable when viewed in the context of the other statutes involving the provision of veterans' benefits." *Id.* at 7. The court stated that many of those statutes make clear that compensation can only "be given for disability existing on or after the date" on which the application for benefits is filed. *Ibid.*; see 38 U.S.C. 5110(a), 5111(a). The court also explained that the "current symptomatology" requirement is consistent with veterans benefit statutes governing nonmonetary benefits, such as medical benefits, many of which are "limited to those veterans who have a service-connected disability at the time of application." Pet. App. 7; see 38 U.S.C. 1710 (1994 & Supp. III 1997); 38 U.S.C. 1712 (Supp. III 1997). The court concluded that, "[g]iven the structure of the law as a whole, the Secretary's interpretation of 38 U.S.C. § 1110 as requiring demonstration of symptoms at the time the application is filed * * * is not impermissible." Pet. App. 7 (internal quotation marks omitted).

ARGUMENT

Petitioner contends that, under *Brown* v. *Gardner*, 513 U.S. 115 (1994), any regulation that resolves interpretative doubts adversely to a veteran is per se unreasonable and not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that consequently the Federal Circuit should not have deferred to the "current symptomatology" requirement of 38 C.F.R. 3.304(f). Pet. App. 5-6. Petitioner's contention is without merit, for neither *Gardner* nor its antecedents create a special rule for the application of *Chevron* in the veterans benefit context. The decision of the court of appeals is correct and does not conflict with any decision of this Court. Accordingly, further review of this case is not warranted.

1. "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). We are aware of no broad exceptions or differing applications, such as petitioner urges, to the rule that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Ibid.* (quoting *Chevron*, 467 U.S. at 843).

Petitioner errs in claiming that *Gardner* requires a different rule of deference in the context of VA interpretations of veterans benefit statutes. In *Gardner*, this Court held that 38 C.F.R. 3.358(c)(3)'s requirement that the veteran demonstrate "fault on the part of the VA" in order to obtain certain benefits was inconsistent with the plain language of the statute it implemented,

38 U.S.C. 1151. 513 U.S. at 117-120. As petitioner points out (Pet. 6), in doing so, the Court noted that, in interpreting veterans benefit statutes, ambiguities are resolved "after applying the rule that interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118 (citing *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991)). Seizing upon this statement, petitioner construes *Gardner* as a mandate that all VA regulations must be written to favor veterans by providing them with benefits in every conceivable circumstance under the statutes. Pet. 6-7.

Nothing in *Gardner* indicates that the Court intended to create a "no-deference" rule, under which any VA gap-filling regulation that arguably operates to "den[y] benefits" to a claimant under a veterans benefit statute "is unreasonable." Pet. 7. *Gardner* was not even decided upon the basis of deference. Because the Court found that the text of the statute was clear, the reasonableness of the VA's construction was irrelevant. *Gardner*, 513 U.S. at 120; see *Chevron*, 467 U.S. at 842 (when the text of the statute gives a clear answer, that is "the end of the matter").

The language upon which petitioner relies accurately noted the long-held understanding that veterans benefit statutes should be liberally construed in accordance with their remedial purpose. See *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (discussing the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"); *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) (Act "is always to be liberally construed to protect those who have been

obliged to drop their own affairs to take up the burdens of the nation"). This simply means that, in promulgating and applying regulations—indeed, in fulfilling its mission—the VA should interpret veterans benefit statutes in the context of the broad scope of the government's intentions toward veterans. See *Bailey* v. *West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring in the judgment) ("This entire scheme is imbued with special beneficence from a grateful sovereign."). It does not mean, however, that a regulation, no matter how well-advised and consistent with the statutory scheme, is per se unreasonable whenever it precludes any claim for benefits, no matter how tenuous, that a veteran might arguably make under a statute. Nor does it disturb the fundamental principle that deference must be given to the governmental entity that administers the statute simply because, in a specific case, a regulation operates to preclude a claim. Indeed, the Federal Circuit has consistently and correctly applied that principle in the veterans benefit context. See, *e.g.*, *Hodge* v. *West*, 155 F.3d 1356, 1360-1362 (Fed. Cir. 1998); *Smith* v. *Brown*, 35 F.3d 1516, 1526-1527 (Fed. Cir. 1994); *Prenzler* v. *Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991). It did not err in doing so here.

2. There can be no doubt that the VA properly interpreted the statutory scheme when it required "current symptomatology" pursuant to 38 C.F.R. 3.304(f) in order for a veteran to receive disability benefits for PTSD. As the Federal Circuit rightly explained, the VA's requirement is consistent with statutory provisions stating that no monetary benefits can be paid to veterans to compensate them for periods of time prior to the filing of an application. See, *e.g.*, 38 U.S.C. 5110(a), 5111(a). Likewise, it is also consistent

with statutory limitations allowing the provision of non-monetary benefits to claimants who have a service-connected disability only if the disability exists at the time the application is filed. See, *e.g.*, 38 U.S.C. 1710 (1994 & Supp. III 1997); 38 U.S.C. 1712 (Supp. III 1997). The statutory scheme does not contemplate the provision of benefits to claimants for problems that may have manifested themselves in the past (that is, prior to the filing of an application) but can no longer be shown to affect the claimants. The VA's interpretation of Section 1110 in 38 C.F.R. 3.304(f) for benefits related to PTSD accords well with this statutory scheme.

The interpretation also accords well with common sense. Many veterans experience in-service stressors during their war-time duty. Not all veterans who experience such stressors develop PTSD. The only way to distinguish a PTSD sufferer, or someone who had an in-service stressor that caused him to develop full-blown PTSD, from a veteran who simply experienced an in-service stressor is to require a diagnosis of current PTSD symptoms to determine whether the veteran in fact has PTSD. In this case, the record shows that repeated psychiatric examinations of petitioner revealed that he did not suffer from PTSD. Pet. App. 2, 19. Because the record shows only that petitioner suffered an in-service stressor, and not that he had symptoms warranting a diagnosis of PTSD, the VA's regulations properly exclude him from the class of persons who may receive disability benefits for PTSD. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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